UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GEA MECHANICAL EQUIPMENT U.S., INC.,	.	
Plaintiff,	.	Case No. 20-cv-09741
vs.	.	Newark, New Jersey October 8, 2020
FEDERAL INSURANCE COMPANY, et al.,	.	
Defendants.	.	

TRANSCRIPT OF HEARING: COURT'S RULING
BEFORE THE HONORABLE EDWARD S. KIEL
UNITED STATES MAGISTRATE JUDGE

This transcript has been reviewed and revised in accordance with L. Civ. R. 52.1.

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I N D E X

(Commencement of proceedings)

THE COURT: Good morning, everyone. We're on the record in matter of GEA versus Federal Insurance Company. It's Case Number 20-cv-09741.

If we could have the appearance on behalf of plaintiff.

MALE SPEAKER: On behalf of --

MR. SAFAR: Your Honor, this is Joe Safar from K&L Gates. And also for plaintiff Don Kiel of K&L Gates and Erin Fleury of K&L Gates.

THE COURT: Good morning, everyone.

And then, Mr. Mahoney [sic], can you make your appearance on behalf of defendants?

MR. MALONEY: Sure, Your Honor. This is John Maloney of Gimigliano Mauriello & Maloney on behalf of the Hartford defendants.

I should point out there are a few other defendants in the case that are separately represented.

THE COURT: Oh, they are. Okay.

Is there anybody else on the line?

MS. MCKENNA: Yes, Your Honor. This is --

MR. PINTER: Yes, Your Honor.

Go ahead, Caroline.

MS. MCKENNA: Your Honor, Caroline McKenna from

Ford Marrin. Also on the call, you heard is Mr. Pinter. As we discussed last week, my admission to the District of New Jersey is pending, but with Your Honor's permission, I'll be speaking on behalf of Continental. If not, Mr. Pinter can do it as well.

THE COURT: Okay. Very good.

And you have Continental Insurance, Wellfleet, those two companies.

And I should put on the record that Mr. Maloney has Hartford Accident and Indemnity Company, Hartford Insurance Company, and First State Insurance Company.

So let me just start with maybe Mr. Maloney or Ms. McKenna -- and thank you, everybody, for getting on the call on time and also sending in the joint -- joint letter. And it was very helpful, and I took a good look at it and reviewed a lot of the cases.

But it seems to me that -- that the National Union Fire case that Judge Clark had written back in 2018, seems to address very similar or maybe the same issue in this case, and I'm wondering from the defendants' perspective -- and I'll start with Mr. Maloney, if he wants to address this -- how is the National Union Fire case distinguishable from the issue that's presented here today?

MR. MALONEY: Sure, Your Honor. I'm happy to start with that.

The National Union -- or the Becton Dickinson case, from our perspective, it is quite distinguishable from the circumstances that we have here.

First of all, Becton Dickinson was a suit filed by the insurer as opposed the insured. And thus the insured in that case did not affirmatively place anything at issue. But moreover the insurer in Becton Dickinson never contended that it would have defended the insured in the underlying action, and thus had access to the privileged documents. That's a big and very critical distinction from this case. It prevents the insurer in Becton Dickinson from arguing that those communications would impact what it would or wouldn't have done.

And, as you know, Your Honor, that's one of the significant points that we've tried to raise on this motion that in order to establish a late notice defense under New Jersey law, we need to establish what -- what the defendant wouldn't have done. And to deprive -- counsel's analysis and communication necessarily deprives the defendants from assessing the issue that's most critical to their defense. You know, what would we have -- what would the defendants have done better or differently if timely notice had been provided?

THE COURT: I thought that that was the same claim that the insurer was making in the Becton Dickinson -- in the

Becton Dickinson case that by claiming that the -- that there was no appreciable prejudice and that their notice was timely, that National -- that Becton Dickinson had placed the whole issue of these private communications with this -- with its counsel in issue in the case. It seemed to be very similar issues and a similar type of thing that they were trying to get in that National Union v. Becton Dickinson case.

And whether who was the one that was -- is the plaintiff in the case and filed the complaint first, what the issues that were -- or what with the issues that shook out in that case seemed to be similar, it's -- it didn't really, to me, look like it mattered for this analysis, who filed the complaint first, whether it was a declaratory judgment first by the insured or by the insurance company.

But how about you, Ms. McKenna, what -- is there anything further different than you see in that case from this case?

MS. MCKENNA: Yes, Your Honor. And in addition to what Mr. Maloney said, I would add that in that case, the entire -- the defense counsel himself had been subpoenaed. He was not a party to the case. And his entire file had been subpoenaed.

And so, here, it's obviously not a nonparty's materials or work product that is being sought. It's a

discrete narrower issue of what the insured who breached the conditions of the contract and then brought this suit was told and then how they acted on that information. So it's a narrower issue being sought here, Your Honor.

THE COURT: Yeah, sorry to -- sorry to interrupt you, Ms. McKenna.

But the way that I read your papers when I read -- or the way that I read defendants' position was they were looking for all the communications and all the privileged documents between GEA and its counsel, not just some targeted specific documents.

Am I mistaken about that?

MS. MCKENNA: You're not, Your Honor. I was making the distinction between directly subpoenaing the defendant's counsel's entire file, including things that were provided to the client and what we're seeking here which is what the client was actually provided by defense counsel.

THE COURT: Oh, so then -- so then the distinction that you're seeing is in the National Union case, there was a greater degree of information that was sought through the subpoena to the counsel than what you're seeking here?

MS. MCKENNA: Correct.

THE COURT: Okay. All right.

And, Mr. Safar, you got any comments about the National Union case, because it seems to be really something

that is in this district, written by Judge Clark only a couple of years ago, and it seems to be similar to the issues in this case. So I'd like to hear from you on what you think about that case.

MR. SAFAR: Your Honor, absolutely. Thank you very much.

I think it is -- not only is it similar, but I think it's really on all fours. There's no reason for a different result in this case. And I'm going to confine my comments, unless Your Honor has -- would like -- would like more, I'm going to confine them to rebutting some of the assertions that we've heard from Mr. Maloney and Ms. McKenna --

(Simultaneous conversation)

MR. SAFAR: Okay. First of all, Mr. Maloney says that it's distinguishable because that was a suit filed by the insurer, and in that case the policy holder didn't place it at issue. Of course, in their papers, they say that -- that GEA placed late notice at issue through its affirmative allegations in paragraph 19 of the complaint. I don't know if Your Honor has taken a look at paragraph 19 of the complaint. But all paragraph 19 -- and they badly mischaracterized paragraph 19 of the complaint.

All paragraph 19 --

THE COURT: I've read the complaint. I have read

the complaint. But I wasn't focused on paragraph 19. But I have it in front of me now.

MR. SAFAR: Paragraph -- oh, so you see all paragraph 19 alleges is a general allegation that all applicable conditions precedent to recovery, if any, have been satisfied.

And that's where they hang their hat and say that's how the plaintiffs affirmatively put late notice at issue.

But, of course, under New Jersey law, late notice is an applicable condition precedent. It's an affirmative defense. And they know that it's an affirmative deference because they all alleged it as an affirmative defense. Hartford alleged it as an affirmative defense, as its tenth affirmative defense. CNA and Wellfleet alleged it as their sixth affirmative defense. And CNA and Wellfleet went even further, and their answers have counterclaims. They asserted counterclaims for late -- for late notice.

So that puts it on -- that puts it on four squares with the Becton Dickinson case. They're the ones that alleged it and put it at issue. And this is -- it just boils down to very, very simply what -- what -- you know, stripped of all the smoke and mirrors. They want to assert a -- they have asserted -- they have affirmative defenses that they want to assert, and they think the privileged documents are relevant and would be helpful to them.

But, of course, that's not the standard for piercing privilege.

Second, this motion that they would have been entitled to documents if they had chosen to defend the case, that -- that's -- that is faulty on two scores. One, it's a totally unsupported counterfactual premise. We have -- they've made no factual showing that they, in fact, would have accepted the defense of the case. Of course, we all know from Insurance 101 that when an insurance company gets notice of a case, they have three options: Deny; reserve rights to deny; or unconditionally accept and participate in the case.

Under the first two scenarios, deny and reserve rights to deny, they don't get access to privileged information. There's no question there, because they've set up an adversarial relationship with the policy holder.

Of course, we all -- we know further as a data point that in this case, they got notice while the defense was still alive, albeit while there were posttrial motions pending, and they then chose to deny. They could have accepted the defense then. They could have said we're taking this case over. We're prosecuting the posttrial motions. We're going to run the appeal, you know, blah, blah, blah. But they didn't.

At that point, they chose to deny and set up an

adversarial relationship with the policy holder.

Now, they're coming in to Your Honor and making unsupported assertions of counsel in a letter saying that if we had gotten notice earlier, we would have defended the case. We don't know that --

(Simultaneous conversation)

MR. SAFAR: We don't know that that's the case. And I'm --

(Simultaneous conversation)

THE COURT: Let me just interrupt you for one second, Mr. Safar, and maybe this is my misunderstanding of the facts.

I thought that the -- that the way that the case was positioned now was that the -- that the carriers take the position that they would have covered, had they provided notice, but the time -- but the notice itself was untimely.

Have they disclaimed coverage as well and say that the notice was untimely?

MR. SAFAR: They've -- they've disclaimed coverage.

THE COURT: Oh, okay.

MR. MALONEY: No.

MR. SAFAR: And so -- so the assertion that they would have unconditionally accepted, had the notice been given earlier, is unsupported. It's simply an assertion. We have no affidavits, no factual support for that.

I will say that we -- interestingly, we asked in discovery in this case for the insurers', you know, policies, procedures, guidelines that they use to decide when they deny, reserve rights, or accept coverage. The response we got back from Mr. Maloney, who represents the primary insurers, "Objection, not relevant." Okay?

So I can't even test Mr. Maloney's assertion that they would have accepted coverage, had the notice been given earlier. Maybe they would --

(Interruption in proceedings)

MR. SAFAR: Maybe they --

(Simultaneous conversation)

THE COURT: Let me ask Mr. Maloney that. Let me ask Mr. Maloney that, because that's an issue that I didn't know was in play. I thought that the issue of coverage had been resolved.

But is the issue of coverage itself and whether this claim is going to be disclaimed based upon just the policy as opposed to the untimely notice, is that still -- still at issue?

MR. MALONEY: No, Your Honor. This case is about late notice and lack of cooperation.

And -- are far more -- this is the third claim tendered to Hartford by GEA involving underlying asbestos. And -- was involved in the defense of the prior two claims,

Hartford communicated with counsel -- updates from counsel. And those claims were, you know, relatively minor and were dismissed without any cost to -- you know, in terms of settlement -- by GEA.

The point is our first step -- case is that -- of proper and timely tender of notice -- whenever you're being asked to recreate the past, you know, there is no magic eight ball that allows one to go back and say, well, what would have happened with certainty? So that's why we need the facts that -- as to what was going on in the underlying Thornton action, because that's exactly how Hartford will be in a position to establish what it would have done. Those are the -- those communications that are at issue in this case are the exact communications that The Hartford would have relied on. For example --

(Simultaneous conversation)

THE COURT: Well, isn't that what Judge Clark addressed in their -- in his decision that that's really not the focus of what the communication would have been between the lawyer and the client, but what -- what the carrier would have done differently based upon what information that the carrier had in front of him? The pleadings, from depositions, from those types of things?

MR. MALONEY: But, Your Honor, let me give you an example of why I think that this is different.

And certainly it isn't addressed in the Becton Dickinson case.

We know that GEA missed multiple settlement opportunities, although, candidly, we have scarce facts around those settlement opportunities. But we know that there was at least a mediation and that were offers made or demands made upon GEA to settle.

If Hartford were defending the case or were involved in the defense of the case, there's no doubt that GEA would have said, hey, Hartford, there is demand here of X dollars. You know, what do you think? Do you want to -- do you want to contribute something to settle this case? That's how the insured-insurer relationship works.

And --

(Simultaneous conversation)

THE COURT: But then -- but then if that actually happened, wouldn't Hartford have undertaken its own analysis and looked through everything on its own and made its own determination as to what they would have done?

MR. MALONEY: Oh, Hartford would have relied on the analysis of GEA's counsel, which would have been communicating with GEA and with Hartford saying, this is what we view the case to be worth, this our analysis of the case. I mean if there was a mediation in this case -- and I'm going to use hypotheticals, because I don't have real numbers, but

let's say there was a demand made upon GEA for a hundred dollars. And let's say GEA's counsel said, well, we think this case is worth $50. But, you know, we would recommend an offer of $40. And let's say that GEA said, we're not going to follow that advice, so we're going to make an offer of $1.50. Well, that's pretty significant, Your Honor, because that same advice as to the value of the case would have been tendered to Hartford, and Hartford would have been the one paying it and controlling the decision as to what money to be paid.

So to analyze after the fact what Hartford would have done in a situation -- tremendously handcuffed without Hartford having the information that would have guided --

THE COURT: You started breaking up. I think you were finished.

Mr. Safar.

MR. SAFAR: Yeah, Your Honor, thank you. I just want to --

THE COURT: Oh, I'm sorry.

MR. SAFAR: I want to return just kind of where I was before we -- before we went off on the point that Mr. Maloney just made.

And just one last point on this idea that --

THE COURT: Sure. Go ahead.

MR. SAFAR: That they would have had access to the

privileged documents.

Even if we accept the -- the unsupported assertion that the -- first of all, Hartford has asserted in their answer, 36 separate affirmative defenses. So this is the first time I've heard from Mr. Maloney that the only issue in this case is late notice, but it sounds like an amended answer is in order now, dropping every affirmative defense except for late notice. And unless that's forthcoming, I think what we, you know, just heard is that posturing for purposes of this -- of this motion only.

But even accepting the unsupported assertion that they would have unconditionally accepted coverage earlier as opposed to reserve rights, even doing so, doesn't automatically entitle them to privileged documents under that counterfactual scenario, because all that does is it create- -- all -- all an unconditional acceptance does is create a common interest between the policy holder and the insurer creating the option to share privileged materials without waiving as against the plaintiffs. It doesn't create a compulsion to share them. And that's clear under the *In re Environmental Insurance Coverage Actions* case. It's not a -- common interest is not a compulsion to share. It's -- it merely creates a permissive situation to share.

So, again, the premise that they would have been entitled to the documents is unsupported, and it's wrong.

But let me --

(Simultaneous conversation)

THE COURT: But also when I read Judge Pisano's decision that you guys all cited as well in the NL Industries case, it seemed pretty clear from Judge Pisano's decision that this common interest only applies when the insurer has actually retained counsel and has paid for it. And whether they want to come back later on and say, hey, we would have retained, is that doesn't create the common interest retroactively. That's my understanding of Judge Pisano's decision was back in that case.

MR. SAFAR: Absolutely correct, Your Honor.

And then -- and so -- and now turning to the argument that Mr. Maloney --

THE COURT: Can you just hold on one second. Mr. Safar? Can you just hold on one second?

MR. SAFAR: Sure.

THE COURT: I just need to do one thing.

(Pause in proceedings)

THE COURT: Sorry. I apologize, everyone. I have another conference at 9:30, and I probably overbooked, but I want make sure that I have plenty of time for you guys.

Okay. So, go ahead. I'm sorry.

MR. SAFAR: Your Honor -- yeah, Your Honor. This -- this really gets to the heart of the Becton case.

Right? First of all, the insurers in Becton actually did argue that they would have accepted the defense. It's the same argument Mr. Maloney made. And if there's any -- if there's any question about that, we're happy to -- we're happy to send in the briefs where National Union, in fact, advanced that, you know, same argument. But I don't think that's -- that's neither here nor there.

The idea that they need the subjective analysis of counsel to be able to second-guess or make their own determinations about what they would have done to defend the case, doesn't hold together. Right? I mean, legal advice, these -- this advice of counsel really consists of three things. Right? It's the application of law and counsel's judgment to the facts of the case to arrive at a recommendation about a course of action to be taken in the -- in the defense. Right?

They have three out of those four things are not privileged. The facts of the case are not privileged. The law is not privileged. Right? And the actions that counsel actually took are -- as the Becton case recognizes are reflected in the nonprivileged record. They can look at the trial transcript, look at the motions that were filed, look at the experts that were presented, look at the arguments that were made. They can see -- they can see the offers, the -- you know, someone demands, they can see the responses.

They can see the offers. We're not saying that that's privileged. In some instances, it was oral, so they're going to have to seek discovery of it, you know, either through a deposition or by asking interrogatories, but anything that was exchanged with the plaintiffs, that's obviously, fair game.

So all that they're missing -- right? -- is counsel's subjective analysis.

But just -- as Your Honor just pointed out, they don't need that to decide or to make an argument about whether or not they would have done something differently. They have all the ingredients, and they can say, based upon --

(Simultaneous conversation)

MR. SAFAR: -- they can hire an expert or whatever, based upon the law, based upon the facts --

(Simultaneous conversation)

MR. SAFAR: -- we wouldn't have done -- we wouldn't have zigged --

(Simultaneous conversation)

THE COURT: Mr. Safar, you know, and I -- and I appreciate that argument, and I know that's what Judge Clark had decided.

But I think from the defendants' perspective, what they're saying is, hey, we have the ingredients. But there's

a chef out there, and there's this great lawyer, he's got a lot of experience, he's got trial experience, he can give us some more flavor to the case, and that may have been something that may have influenced us. I think that's their counter to that argument.

But I understand certainly where you're coming from, Mr. Safar.

MR. SAFAR: Right. But -- but that really just boils down to, well, that would be one more thing that would be helpful. Right? And that's not the standard for piercing our privileges. It's not just that it would be helpful -- and let me just say, Your Honor, that if -- and I don't -- it doesn't sound to me like you're, you know, heading in this direction, but there's a serious goose-and-gander issue here, which is that if our privileges are pierced so that they can see what counsel's advice was so that they can then take -- so they can have somebody take the stand, presumably some claims handler, and say, oh, well, if I was privy to that advice, I wouldn't have followed it. I would have taken the case in a different kind of direction.

Now, they've put at issue when their own claims handlers choose to follow counsel's advice or not. And if they get this discovery, I have to get rebuttal discovery in order to be able to rebut that, because if their own files are filled of -- filled with examples from other cases with

similar facts -- right? -- where their claims handlers, in fact, followed similar advice to what they got from our counsel, they cannot be allowed to take the stand and introduce into evidence our privileged documents and say in a totally unrebutted manner that they wouldn't have followed that advice, because in their decades of experience as claims handlers, that's not a piece of advice that they would follow. Right? And so now we have just opened up Pandora's box on this, because -- because, you know --

(Simultaneous conversation)

THE COURT: We're not at that point right now -- we're not at that point right now. But that's -- but that may be an issue that we'll address later, but I'd like to stick to this.

So let me just finish up.

Anybody from the defendants' side want to add anything further? I read all the papers. I understand the arguments. I've read all the cases that you -- that the parties have cited to me.

So I'll ask the defendants if they have anything further?

MR. MALONEY: Yes --

MS. MCKENNA: Yes, Your Honor go ahead --

THE COURT: Okay. Why don't we start with Ms. McKenna, since she got to go second.

MS. MCKENNA: Thank you, Your Honor.

I just would -- I'm going to focus on the point Mr. Safar made about us raising late notice as an affirmative defense. You know, other cases besides Becton, including the Human Tissues Product Litigation case --

THE COURT: Yeah, sure.

MS. MCKENNA: -- talk about whether you put something in issue as being an issue of fairness.

And, here, you know, we didn't allegedly notice -- our reason. We alleged late notice because plaintiffs provided extraordinarily late notice after a $70 million verdict was entered.

So the idea that it's an affirmative defense and, therefore, it's not at issue because we pled it as an affirmative defense, I think, really misses the mark and shows kind the unfairness of plaintiff's position.

THE COURT: Okay. Thank you very much.

And then Mr. Maloney?

MR. MALONEY: Yeah, if I could just add to Ms. McKenna's comments, in the Human Tissue case, Judge Falk set forth a three-part test to determine what is at issue. And I don't think there's -- there should be any real dispute that we satisfy that three-part test, that GEA made an affirmative act which Judge Falk described as filing a suit that put the information at issue by making it, quote,

relevant to the case. Relevant to the case doesn't necessarily mean relevant to GEA's claims, although they are, but it's also relevant to the -- in this case.

The third prong of that test is that the assertion of privilege would deny the defendants access to information vital to their defense, which, again, as we discussed at length, I think, is clear here.

And if I could turn Your Honor's attention to the Hoechst Celanese case, in that case, the exact same allegations of compliance with policy conditions were expressly found to have placed privileged communications at issue, which is the point that Mr. Safar was making. And -- Celanese case -- and I think it's a Delaware case, although Delaware law on this issue is not substantively different, but Hoechst Celanese is really instructive, because in that case, the Court found that whether the insured had complied with those conditions of coverage "can only be truthfully and fairly determined by an examination of the conduct of the insured and its counsel in the underlying litigation."

It went on to say that "to hold otherwise would permit an insured to seek coverage for claims while denying the insurer access to information about the underlying claims, which is contained substantially, if not exclusively within the communications claimed to be privileged."

And that's the point we've been making all along,

Your Honor, that this isn't a case where we're seeking a broad, you know, ability to pierce the privilege simply because there's a coverage dispute. This is a lot more narrow than that, and it's focused on the fact that if we're going to establish what we would have done, we have to have the facts that would have been available to us at the time.

THE COURT: Okay. All right. Well, thank you very much. I did look at the Hoechst Celanese Corporation case. That was a case out of the District of -- I'm sorry -- the Delaware Superior Court back in 1992. It was a complicated case that involved communications between a counsel and the client during different periods of time when there was coverage and there was a denial of coverage. And I appreciate you going over that case with me.

All right, everyone. Let me just get my papers together. And let me ask you, Mr. Safar -- this is sort of a silly question. Is it GEA or GEA?

MR. SAFAR: It's either, Your Honor, GEA mechanical. GEA. It's all -- it all works.

THE COURT: Okay. Okay. I'll call it GEA, since it's easier to say. All right. Very good.

Well, in this case, plaintiff seeks coverage for an asbestos claim that resulted in a judgment against plaintiff in the amount of $70 million. And the underlying complaint that resulted in this declaratory judgment action was filed

in Florida in 2017 by Charles and Constance Thornton. The Thornton action proceeded to trial in June of 2019. And the Thorntons claimed that damages resulting out of Mr. Thornton's alleged exposure to products that contained asbestos that were allegedly made, sold, or distributed by GEA's predecessor in interest. The jury returned a verdict of $70 million. And judgment was entered in June 2019.

And in August of 2019, while posttrial motion and a potential appeal were pending, plaintiff tendered the Thornton claim to some of the defendants, and prior to that notice, plaintiff had not provided any notice of the Thornton claim to defendants; at least that's my understanding of the facts.

And in September 2019, plaintiff participated in mediation and kept defendants apprised of what was going on. A confidential settlement was reached with the Thorntons on September 24th, 2019. And the defendants, apparently, did not object to the settlement; at least, that's what I read from the papers.

Defendants have disclaimed coverage, as I understand it, based in part on what they believe was an impermissibly late notice of the claim by plaintiff. The complaint was filed on August 6th, 2019, in New Jersey Superior Court and removed to this Court on July 31st.

The parties submitted a joint letter on

September 21st -- did somebody just join?

FEMALE SPEAKER: Good morning, Christina --

THE COURT: Is this on the Hollands matter?

FEMALE SPEAKER: Oh, no, this is not. This is the wrong conference line. I apologize.

THE COURT: Okay. Thank you.

FEMALE SPEAKER: Bye.

THE COURT: With COVID and everything, all these technology things, we have a lot of people coming in sometimes. And I apologize for that.

But going back to what the parties submitted a joint letter on September 21st concerning a discovery dispute involving the defendants' request for certain information. That was ECF Number 10. And the dispute centers around whether plaintiff is required to produce documents and information relating to the underlying Thornton action that is subject to the attorney-client privilege. To date, plaintiff has said that it produced over 70,000 pages of documents, but withheld the attorney-client privileged and attorney work product documents from the production. Plaintiff also objected on certain relevancy grounds as to certain requests.

So as a threshold matter, defendants, as I understand it, don't dispute that the withheld documents would normally be protected by the attorney-client privilege

and the work product privileges, because they encompass defense strategy and analysis and settlement negotiations, settlement analysis and things that would normally be protected by the privilege. The defendants argue that they're entitled to view what would normally be privileged because plaintiff and its counsel in the underlying case, as well as the attorney work product -- as well as the attorneys' work product, because GEA has placed these communications in issue in the case. And defendants argue the communications are in issue because plaintiff claims the notice to defendants of the Thornton action was not untimely, while defendants take the position that the notice was impermissibly untimely. Whether it's an affirmative defense or -- or, like in the case before Judge Clark, it was an affirmative claim or a declaratory judgment affirmative claim by the insured, I don't think is really relevant.

Under New Jersey law, in order for a carrier to succeed on a defense of untimely notice, the insurer must show that there's a breach of the notice provision of the policy and a likelihood of appreciable prejudice. To demonstrate this appreciable prejudice, defendants must prove that, first, substantial rights have been irretrievably lost by virtue of the failure of the insured to provide notice in a timely fashion; and, second, the likelihood of success of the insurer in defending the claim.

Defendants also argue that had timely notice been provided, it would have been able to participate in the defense of the Thornton action and would I have access to plaintiff's counsel's files. And defendant proffers that from what has already been produced, there seems to be evidence that there were opportunities to settle the underlying case for what they call a fraction of the judgment amount. I don't have those facts in front of me, but I take their representation.

Thus, according to defendant, attorney-client communications relating to the settlement proposals, the evaluation and analysis of the claims and the settlement demands and the decisions made in responding to the settlement demands are relevant to the issue of appreciable prejudice. This is because defendants would have had the opportunity to evaluate any settlement demands in conjunction with and in light of the advice of GEA's counsel, since defendants would have been funding a settlement and probably funding the defense cost as well.

If defendants were not able to obtain the privileged communications, defendants say it would create "a formidable obstacle" to their efforts to determine whether they would have acted differently, had timely notice been provided. And withholding the communications would deprive defendants of the very information that they would have used

in evaluating the course of the underlying litigation, and from the defendants' perspective, indeed, these communications would have been provided to defendants if -- if the plaintiff had timely notified the defendants and the defendants were able to participate in the defense of the underlying case.

On the other hand, plaintiff argues that an attorney-client privilege should not be pierced and should not be pierced in this case, and the case law says that it's only pierced in the narrowest of circumstances. And plaintiffs cite the cases that they say stand for the proposition that the privilege is only pierced where a constitutional right is at stake or where a party has explicitly waived the privilege. Plaintiff views binding case law as finding a waiver of the privilege where a party seeking to claim the privilege is using -- is seeking to use the privileged communication and information to prove its claim or defense in the case. So, in other words, a court will not let a responding party use the attorney-client privilege both as a sword and a shield. So if a responding party will use communication as a sword -- for example, to disclaim liability based on the advice of counsel -- the responding party cannot then prevent the requesting party's attempt to gather discovery relating to that advice of counsel. I think that's black-letter law and everybody

agrees with that.

Under that understanding of case law, plaintiff argues that defendants are not entitled to the production of any privileged information because plaintiffs does not -- because the plaintiff does not intend to rely on any privileged communication or information to prove its claim or defenses or anything in this case.

Plaintiff also argues that defendants have not cited to a single case in this district where a court has held that a party seeking coverage under an insurance policy placed privileged communications in issue and thereby was required to produce such communications. Plaintiffs cite to various cases, you know, that stand for their position on this -- on this issue.

Plaintiffs also argued that a privileged communication and information are irrelevant because the inquiry relating to appreciable prejudice is what action the insurer would have taken, rather than the actions taken by the insured, which is what the privileged information would show. The burden is on the insurer to show what specific steps it would have taken to achieve a more favorable result. Thus, according to plaintiff, it is not relevant why the case was handled in the manner it was, but what the insurers would have done differently under the circumstances and they have all the facts in front of them.

Finally, defendant says that -- I'm sorry.

Finally plaintiff says that defendants have not demonstrated there are less restrictive means to obtain the relevant information it seeks. It has produced over 70,000 pages of documents, and from reading of it, I assume those documents encompass all the pleadings and depositions, motions; correspondence between the parties; trial binders, mediation memos; and any other nonprivileged documents relating to the underlying case.

So the issue, as I see it, is whether the privileged information and documents defendants seek will be relevant to defendants' claim of appreciable prejudice resulting from plaintiffs' alleged late notice of the Thornton claim.

When a case is based upon federal diversity jurisdiction, courts decide issues of privilege based upon state law. *In re* Ford Motor Corp., 110 F.3d 954 (3d Cir. 1997). *In re* Kozlov, 79 N.J. 232 (1979) the New Jersey Supreme Court set forth the analysis to be conducted to determine whether to compel disclosure of a privileged communication. Under that decision, the party seeking disclosure must establish first there's a legitimate need for the evidence; second, the evidence must be relevant and material to the issues before the court; and, third, by a preponderance of the evidence, the requesting party must show

that the information cannot be secured from less intrusive means.

When a party places confidential communication in issue, that party voluntarily creates a need for the disclosure of those confidences. State v. Mauti, 208 N.J. 519 (2012). Under New Jersey law, in order for a carrier to succeed on a defense of untimely notice, the insurer must show there's a breach of the notice provision in the policy and a likelihood of appreciable prejudice. That is Cooper v. Government Employees Insurance Company, 51 N.J. 80 (1968). In determining whether appreciable prejudice exists, courts must look at whether, first, substantial rights have been irretrievably lost by virtue of the failure of the insured to provide notice in a timely manner, and, second, the likelihood of success of the insurer in defending the claims. Morales v. National Grange Mutual Insurance Company, 176 N.J. Super. 347 (Law. Div. 1980)

The issue presented here was addressed by Judge Clark in his decision in the National Fire case, which is at 2018 WL 627378 (D.N.J. 2018). In that case, an insured waited 16 years from the commencement of a case and 10 years after a $100 million settlement of two antitrust cases to tender the claim to the carrier. Like in this case, in National Union, the insurer argued that it needed to review privileged communications between the insured and its

attorney in the underlying action as part of its defense that it suffered appreciable prejudice. The carrier wanted to depose the insured's attorney concerning evaluations of strategy and impressions regarding the merits of the claim. And, like in this case, the insurer in National Union argued that privileged information and communication with the attorney were placed in issue, because plaintiff's position that it was timely notified -- because of plaintiff's position that it timely notified defendants created the need for the disclosure of privileged communication and, thus, the insured waived the privilege.

In that case, Judge Clark found two flaws in the same arguments being made here by defendants. First, that any defense by an insurer based upon appreciable prejudice against an insured's claim for coverage would always then require the disclosure of privileged information, and such a conclusion would create too wide of an exception to the attorney-client privilege. So, in other words, there must be something more than a defense based on untimely notice, because then every coverage case where untimely notice is an issue would require the disclosure of privileged information and communication.

And, second, Judge Clark found the carrier's argument mischaracterized the relevant inquiry and the burden of proof to determine appreciable prejudice. In National

Insurance, the insured argued that the carrier could not have achieved a better result. Although facially it appears to be a different issue than in this case, in reality, it's, to me, is the same issue. In this case, defendants want to see the privileged documents because they want to show that they would have achieved a better result than GEA, and, to me, that's just a mirror image of the insured's position in National Union that the carrier would not have a better result.

And Judge Clark noted that the inquiry is not on the effectiveness of the attorney in the underlying case, but the -- what the insurer would have done differently to achieve a better result. And so the burden is on the carrier to show this.

Like Judge Clark, I also surveyed the case law in this district and looked at the cases cited by the parties. Judge Clark did not find a single case in which a judge allowed the piercing of the attorney-client privilege based on a carrier's defense of an impermissibly untimely notice. And from my research, that has not changed in this district since Judge Clark's opinion in 2018.

And Judge Clark also found that the carrier did not meet its burden to show that there were no less intrusive means to obtain the information. Judge Clark wrote that the insurer may obtain information it needs to show appreciable

prejudice from a variety of nonprivileged sources, "including the pleadings, motions, depositions, transcripts, communications between opposing counsel, and any discovery produced therein, and by examining such sources plaintiff should be able to develop its own information and impressions regarding the underlying action and present its argument as to what it would have done differently and what more favorable outcome it would have achieved under the second part of the appreciable prejudice inquiry."

Further, defendants can inquire about plaintiff's -- can inquire through plaintiff's representatives about the analysis of the case and settlement strategy without delving into attorney-client privileged communication. Judge Clark cited as an example that plaintiff's 30(b)(6) representative could be questioned why a certain demand was not accepted without testifying about privileged communication. And the witness can certainly testify about his own analysis of the settlement demands and claims.

Although not explicitly stated, a logical extension of defendants' argument and that the need to know what the communication and advice was from GEA's attorney is that they need to know that in the underlying action because they would have been privy -- they would have been privy to that information, and their decisions would have been informed by

the advice of counsel. But, again, this is not the analysis, and I agree with Judge Clark that that is not the analysis. Defendants can review all the same documents, information, settlement demands and settlement offers that were on the table and make their own analysis of how they would have reacted. They can consult with competent counsel, which I am sure defendant knows, to perform an independent legal analysis. And in this way, there are less intrusive ways to obtain the information to demonstrate appreciable prejudice, which will likely be what I figure an attack on GEA's failure to settle the case prior to trial.

I also note Judge Pisano's decision in NL Industries, 144 F.R.D. 225, (D.N.J. 1992), also cited by the parties and in that case, the carrier sought the production of privileged communications between the plaintiff and its attorney in an underlying environmental action. The carrier argued it was entitled to the information because it had a common interest with plaintiff and the insured that placed the privilege communication at issue in the case. Judge Pisano denied the request finding that there was no common interest and the communications were not placed in interest and the information sought was irrelevant. Judge Pisano found that common interests may be found only when the carrier retained the attorney. Facts of Judge Pisano's case are certainly distinguishable in a way in that the carrier

had denied coverage, and I understand that the carrier is taking the position that it would not have denied coverage in this case. But the carrier in Judge Pisano's case asserted a common interest.

But the result should be no different in this case. Here, defendant did not know of the claim and therefore did not retain counsel to defend plaintiff. But that fact does not change the analysis and thereby retroactively confer a common interest relationship between the carrier and GEA. GEA retained its counsel, which only served and represented GEA and only shared privileged communications with GEA.

And I can't -- those -- those who are coming on the Holland -- can you just please stand by? Hollands matter.

We cannot assume these privileged communications would have been exactly or even substantially the same if defendants were providing coverage at the time. In fact, I'm pretty confident, including that GEA's attorneys' analysis -- with its clients, analysis of the settlement discussions and evaluation of the claim would have been substantially different had there been a carrier backing up the defense and indemnifying GEA. It's too far of a stretch to conclude that an attorney representing what he or she believed to be an uninsured client would have acted in the same manner if there were confirmed insurance coverage. Thus, that attorney's mental impressions and analysis of settlement positions and

strategy are not, in my mind, relevant to what, if anything, defendant would have done differently.

To me, the flaw in defendants' logical leap is that the privileged communications would have been exactly or substantially the same if there were confirmation of insurance coverage. Only in that way, would the communications impacted or influenced the insurance decision.

And my thought with insurance coverage, the landscape of the case from GEA's and its attorneys' perspective would be substantially different than what they faced in the underlying Thornton action. As Judge Pisano wrote, "The privileged communications were produced in a period of uncertainty or in this case, lack of coverage, and was never intended to be discoverable." And I think the same is true here.

And Judge Wolin similarly held in North River Insurance Company v. Philadelphia Insurance, 797 F. Supp. 363 (D.N.J. 1992) that an insured does not automatically have common interest between an insured and its counsel. I think this is an issue that was raised at the end in oral argument by plaintiff's counsel. Indeed, the common interest can only be conferred when the carrier retains the attorney for the insured. To me, this makes sense because injecting a carrier and its unique experience and influence over a litigation significantly changes the dynamics of the relation from a

two-party relationship to a tri-partite relationship.

So weighing the importance and sanctity of attorney-client privilege, the very limited circumstances in which the privilege can be pierced, and the prevailing case law in this district, I find the defendants have not met their burden to demonstrate that GEA waived the privilege by putting the confidential communication and information in issue in this case or demonstrating that there's less restrictive means to getting the same information.

So defendants' application to compel production of privileged information and documents from plaintiffs is denied. And I'll enter an order incorporating that decision.

Everybody, just hold on one second. Let me just get everybody off the record.

(Conclusion of proceedings)

Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 41 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

S/ *Sara L. Kern* 14th of October, 2020

Signature of Approved Transcriber Date

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